IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD BENIGNO, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	No. 01-CV-2158
THOMAS F. FLATLEY, et al.	:	

M E M O R A N D U M / O R D E R

Ludwig, J. September 13 , 2001

In this action for breach of contract, unjust enrichment, fraud, and tortious interference with a contractual right, defendants Thomas F. Flatley, American Financial Enterprise, Inc., and K Cabo, Inc., move to "Dismiss and/or Strike" the complaint under Fed. R. Civ. P. 12(b)(6) and 12(f).[1] Jurisdiction is diversity, 28 U.S.C. § 1332, and Pennsylvania law governs the substantive issues. The motion is ruled on as follows.

I. Breach of contract (counts I and II) – denied. According to defendants, the complaint is deficient because it does not allege that plaintiff satisfied the conditions precedent enumerated in a "Master Agreement."[2] Under Fed. R. Civ. P. 9(c), "[i]n pleading the performance or occurrence of

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[1] Under Rule 12(b)(6), the allegations of the complaint are accepted as true, and all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. See Brown v. Philip Morris Inc., 250 F.3d 789, 796 (3d Cir. 2001). Rule 12(f): "the court may order stricken from any pleading any . . . redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

[2] As set forth in the Master Agreement, plaintiff was required *inter alia* to form a Mexican corporation named Inversiones Hoteleras Baja, draft an agreement satisfactory to American, and obtain as signatories the owners of the land to be developed. Cmplt ex. A. The Master Agreement:

> That upon completion of all the obligations to be performed by Benigno and in consideration of performing such valuable services by Benigno for American, American shall grant to Benigno the payment of two million four hundred thousand ($2,400,000) dollars, US currency, plus interest thereon from the date that all services have been performed until the fee has been paid, including any interest accumulated thereon at the prime rate of interest as announced in the Wall Street Journal at such time . . . .

Id.

conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." The complaint meets this requirement. See, e.g., cmplt. ¶ 37 (plaintiff "performed all that was necessary to be performed").

II. Unjust enrichment (counts III and IV) – denied. Defendants cite Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987) for the proposition that, under Pennsylvania law, unjust enrichment is inapplicable where the parties' relationship is based on a written agreement. While a correct statement of law, it is premature. A plaintiff may sue on alternative theories of recovery, including, breach of contract and unjust enrichment. See Gonzales v. Old Kent Mortgage Co., No. Civ. A. 99-5959, 2000 WL 1469313, at *5 (E.D. Pa. Sept. 21, 2000) (citing cases). If, upon evidence, a valid contract is found to exist, plaintiff will be precluded from recovery for unjust enrichment.

III. Fraud (counts III and IV) – denied. Defendants would have the fraud claims dismissed for non-compliance with the heightened pleading requirements of Fed. R. Civ. P. 9(b) ("all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") Although Rule 9(b) ordinarily mandates the pleading of the "who, what, when, and where" of the alleged fraud, specifics may also be averred by other means; but what is crucial is that the complaint "inject[ ] precision and some measure of substantiation into the allegations of fraud." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). A recital of the "precise words used" in alleged misrepresentations is not required so long as there is an adequate description of "the nature and subject of the alleged misrepresentation." Id.

IV. Tortious interference with a contract right (counts V and VI) – denied. According to defendants, their negotiations with the "Mexican Group" did not amount to tortious interference with plaintiff's contractual rights. Defendants' position is that they acted in furtherance of legitimate business interests – for which, see Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 665 (3d Cir. 1993) and Green v. Interstate United Management Services Corp., 748 F.2d 827, 831 (3d Cir. 1984), they enjoy broad leeway, free from tort liability. Windsor and Green "accord substantial deference to defendants whose conduct, despite its conflict with plaintiff's interest, protects an existing legitimate business concern." Windsor at 665. However, in the favorable light of Rule 12(b)(6), the complaint cannot be read to mean as a matter of law that defendants' conduct involved legitimate business concerns.[3] It has been said that legitimate business motives entitle a defendant only to *deference* in weighing "the social interests in protecting the freedom of the actor" against "the contractual interests of the other." Green at 831. By simply articulating this point, without more, defendants have not shown good reason for dismissal of counts V and VI.

V. Coercion and extortion (counts VII and VIII) - granted. There is no common law tort of extortion and coercion in Pennsylvania law.

[3]In other words, it is not appropriate at this stage to conclude that the complaint sounds exclusively in breach of contract and not in tort; it is too early to tell whether counts V and VI are barred by the Economic Loss Rule invoked by defendants: "A party has the freedom to breach a commercial contract and pay the ordinary contractual damages for the breach, and cannot be punished for the decision by being sued in tort." Defendants's "Motion to Dismiss and/or Strike" at 7.

VI. Motion to strike plaintiff's claim for punitive damages and for special damages in excess of $12,000,000 - denied. While not recoverable in contract, punitive damages may be supportable here based on the tort claims that survive defendants' motion. See Nicholas v. Pennsylvania State University, 227 F.3d 133, 147 (3d Cir. 2000) ("under Pennsylvania law, 'punitive damages are not recoverable in an action solely based upon breach of contract.'" (citing Johnson v. Hyundai Motor America, 698 A.2d 631, 639 (Pa.Super. 1997)). Our Court of Appeals permits "wide latitude in pleadings...in a recognition that the[ir] purpose...is to give notice of the claim that is being made." Rannels v. Nichols, Inc., 591 F.2d 242, 247 (3d Cir. 1979). See also 2A Moore's Federal Practice ¶ 8.13, at 8-58 (2d ed. 1994) ("The function of pleadings under the Federal Rules is to give fair notice of the claim asserted.").

Plaintiff also requests special damages in excess of $12,000,000 to compensate for the loss of his investment in "The Project." This pleading suffices to give defendants notice of the claim.

VII. Motion to dismiss Flatley and K Cabo from this action and strike plaintiff's alter ego allegations - denied. Defendants Flatley and K Cabo were not parties to the contracts at issue. The complaint, however, alleges that Flatley was the alter ego of the corporate entities, K Cabo, Inc. and American Financial Enterprise, Inc. Cmplt., ¶ 18. So viewed, under Rule 12(b)(6), Flatley and K Cabo are potentially subject to liability even if they were not formal contractual parties. Under Fed. R. Civ. P. 8, it is unnecessary to plead alter ego liability with specificity. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990) ("complaint need only set out a generalized statement

of facts from which defendant will be able to frame a responsive pleading.")

VIII. Breach of Lease Agreements (count IX) – denied. Defendants interpose the statute of frauds as a bar to Flatley's alleged breach of an oral surety agreement.[4] Plaintiff counters that the oral surety agreement falls under the statute's "leading object" exception, because Flatley's main incentive for acting as surety for rental payments to plaintiff was to secure his own business advantage.[5] Defendants' response: Since Flatley's role was that of surety, he himself would benefit only indirectly. See Bayard v. Pennsylvania Knitting Mills Corp., 290 Pa. 79, 84 (1927) ("Ordinarily, the interest which a stockholder has is not individual, for he cannot be held for the corporate debts, and, if a promise to indemnify its creditor is made, the statute of frauds applies."). However, given that the complaint proceeds on an alter ego theory, the "leading object" exception cannot be categorically rejected at this time. This issue will be deferred pending development of the facts of the case.

Edmund V. Ludwig, J.

[4]The Pennsylvania Statue of Frauds: "No action shall be brought...whereby to charge the defendant...to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged herewith, or some other person authorized by him." 33 P.S. § 3.

[5]According to the Restatement (Second) of Contracts:

> Where the surety-promisor's main purpose is his own primary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between promisor and promisee is reduced and the commercial context commonly provides evidentiary safeguards. Thus there is less need for cautionary or evidentiary formality than in other cases of suretyship. Restatement (Second) of Contracts § 116, Cmt. A.